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ANG GAME HONG & ANOR v. TEE KIM TIAM & ORS

FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP PCA
ZAHARAH IBRAHIM CJ (MALAYA)
AZIAH ALI FCJ
B ALIZATUL KHAIR OSMAN FCJ
ROHANA YUSUF FCJ
[CIVIL APPEAL NO: 01(f)-41-09-2017(B)]
15 OCTOBER 2019

C ***CIVIL PROCEDURE:*** *Jurisdiction – Concurrent jurisdiction – Power of High Court – Dispute over ownership of land – High Court's decision to allow judgment in default and recorded consent judgment between parties which was set aside by another High Court – Whether final order of High Court null and void due to illegalities – Whether order made in breach of natural justice – Whether High Court*
D *has power to set aside order of court of concurrent jurisdiction*

The original proprietor of a piece of land ('the land') was Tan Yew Lim ('TYL'), the first defendant's father. The second defendant was the wife of Tan Tuan Kam ('TTK') while the third defendant was the son of TTK and the second defendant. Both TYL and TTK, who were brothers, had passed
E away. The plaintiff had purchased the land from the first defendant by a sale and purchase agreement ('SPA') dated 27 January 2005 for a consideration of RM300,000 which was fully paid. The land was transferred to and registered in the plaintiff's name on 27 June 2005. According to the first defendant, he had inherited the land from TYL. The second defendant and
F the third defendant claimed that the land was bought by TTK but registered in TYL's name as TTK wanted to assist TYL who had no source of income. TYL promised TTK that the title to the land would be transferred to TTK later. TTK's family developed the land and shared the proceeds from the income obtained from rubber, palm oil and fruit trees which were planted
G on the land. The second and third defendants claimed that on 30 September 1995, in the first defendant's presence, TYL had signed Form 14A to transfer the land to the second defendant. The first defendant subsequently entered a caveat on the land as a result of which the Form 14A was rejected by the land office. On 24 September 2004, the second defendant
H filed a civil suit ('the 2004 case') against the first and fourth defendants seeking for the court's order to declare that the land was at all material time vested in her, for the first defendant to transfer the land to her, and for any caveat entered by the first defendant to be revoked. On 16 December 2010, the second defendant obtained a judgment in default in that case against the first defendant for the latter's failure to attend court. On 5 April 2011, based
I on the said judgment in default, a consent order was entered between the

second defendant and the fourth defendant for the fourth defendant to register the second defendant as the land's proprietor. It was also ordered that all dealings by the first defendant in relation to the land were not valid. Following the court order in the 2004 case, the land was transferred from the plaintiff to the second defendant, which was later transferred from the second defendant to the third defendant. The plaintiff then commenced an action ('the plaintiff's action') against the defendants praying for, *inter alia* (i) a declaration that he was a *bona fide* purchaser and proprietor of the land which he had purchased pursuant to a SPA between him and the first defendant; and (ii) a declaration that the transfer of the land from the plaintiff to the second defendant and from the second defendant to the third defendant were not valid. The High Court, in allowing the plaintiff's claim, viewed that the judgment in default dated 16 December 2010 and consent judgment could be set aside as the defendants were aware of the plaintiff's interest in the land but nevertheless proceeded without due regard to the same. Aggrieved, the second and third defendants appealed to the Court of Appeal. The Court of Appeal affirmed the decision of the High Court made in favour of the plaintiff. This court allowed the application by the second and third defendants for leave to appeal on the sole question: when a party has obtained a judgment in default against another party naming her as the owner of a piece of land in a separate civil suit, does the decision of the High Court now, in giving a judgment that a third party was the owner of that land, comply with the decision of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* and *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* in relation to the power of a High Court to set aside an order of a court of concurrent jurisdiction.

Held (dismissing appeal)
Per Ahmad Maarop PCA delivering the judgment of the court:

(1) Where the final order of the High Court is null and void because of illegality or lack of jurisdiction, it could be set aside by another High Court of concurrent jurisdiction. An order made in breach of natural justice is clearly such an order. In such a case, the person affected by the order can apply to have it set aside in collateral proceedings. The judgment in default and the consent judgment entered in the 2004 case were examples of orders made in breach of natural justice. (paras 21 & 22)

(2) There was no evidence to suggest that the first defendant had witnessed TYL signing Form 14A or that the land was bought by TTK and was only registered in TYL's name with the intention of helping TYL. There was also no evidence of any transfer from TYL to TTK. There was no evidence of fraud on the part of the plaintiff when he entered the sale and purchase agreement with the first defendant to buy the said land. The second, third and fourth defendants were all aware of the plaintiff's

interest in the land when the judgment in default and the consent judgment were entered. The plaintiff was neither made parties to the 2004 case before those orders were made, nor were those orders served on the plaintiff. Thus, the judgment in default and the consent order which deprived the plaintiff of his registered interest in the land were irregular, null and void and had no effect on the plaintiff and ought to be set aside. (paras 22 & 25)

(3) The High Court was therefore correct in allowing the plaintiff's claim which had the effect of setting aside the earlier orders of the High Court made in the 2004 case. This was sufficient to dispose of the appeal. There was no necessity to answer the question in respect of which the leave of appeal was given. The orders of the courts below were affirmed. (paras 25 & 26)

Per Rohana Yusuf FCJ (concurring):

(1) It was clear by the writ action that the plaintiff was effectively challenging the validity of the consent order. Since the suit in itself was instituted to challenge the transfer mode resultant from the consent order, no further separate action to challenge the consent order was therefore required since it was already embedded in the statement of claim of the plaintiff. The claim of the plaintiff herein was, to all intent and purposes, a challenge on the consent order, which was irregular, null and void and was rightly set aside by the Court of Appeal. (paras 34 & 37)

***Bahasa Malaysia** Headnotes*

Pemilik asal sebidang tanah ('tanah') adalah Tan Yew Lim ('TYL'), bapa defendan pertama. Defendan kedua adalah isteri Tan Tuan Kam ('TTK') sementara defendan ketiga adalah anak lelaki TTK dan defendan kedua. Kedua-dua TYL dan TTK, adik beradik, telah meninggal dunia. Plaintif telah membeli tanah itu daripada defendan pertama melalui perjanjian jual beli ('PJB') bertarikh 27 Januari 2005 untuk jumlah RM300,000 yang telah dibayar sepenuhnya. Tanah itu telah dipindah milik kepada dan didaftarkan dalam nama plaintif pada 27 Jun 2005. Menurut defendan pertama, dia telah mewarisi tanah itu daripada TYL. Defendan kedua dan ketiga mendakwa tanah dibeli oleh TTK tetapi didaftarkan dalam nama TYL kerana TTK ingin menolong TYL yang tidak mempunyai sumber pendapatan. TYL telah berjanji TTK bahawa hak milik tanah itu akan dipindah milik kepada TTK kemudian. Keluarga TTK telah membangunkan tanah itu dan berkongsi untung daripada pendapatan pokok getah, minyak kelapa sawit dan buah-buahan yang ditanam atas tanah itu. Defendan kedua dan ketiga mendakwa bahawa pada 30 September 1995, dengan kehadiran defendan pertama, TYL telah menandatangani Borang 14A untuk memindah milik

tanah kepada defendan kedua. Defendan pertama kemudian memasukkan kaveat atas tanah dan menyebabkan Borang 14A ditolak oleh pejabat tanah. Pada 24 September 2004, defendan kedua memfailkan guaman sivil ('kes 2004') terhadap defendan pertama dan defendan keempat menuntut perintah mahkamah agar mengisytiharkan tanah pada semua waktu material adalah miliknya, untuk defendan pertama memindah milik tanah kepadanya, dan agar kaveat yang dimasukkan oleh defendan pertama dibatalkan. Pada 16 Disember 2010, defendan kedua memperoleh penghakiman ingkar dalam kes itu terhadap defendan pertama atas kegagalan defendan pertama menghadiri mahkamah. Pada 5 April 2011, berdasarkan penghakiman ingkar tersebut, satu perintah persetujuan dimeterai oleh defendan kedua dan keempat agar defendan keempat mendaftarkan nama defendan kedua sebagai pemilik tanah. Diperintahkan juga bahawa segala urusan defendan pertama berkaitan tanah itu adalah tidak sah. Berikutan perintah mahkamah dalam kes 2004, tanah telah dipindah milik daripada plaintif kepada defendan kedua, yang kemudian dipindah milik daripada defendan kedua kepada defendan ketiga. Plaintif seterusnya memulakan guaman ('guaman plaintif') terhadap defendan-defendan dan menuntut, antara lain (i) satu perisytiharan bahawa plaintif adalah pembeli *bona fide* dan pemilik tanah yang telah dibelinya menurut satu PJB antaranya dan defendan pertama; and (ii) satu perisytiharan bahawa pindah milik tanah daripada plaintif kepada defendan kedua dan daripada defendan kedua kepada defendan ketiga tidak sah. Mahkamah Tinggi, dalam membenarkan tuntutan plaintif, mendapati bahawa penghakiman ingkar bertarikh 16 Disember 2010 dan penghakiman persetujuan harus diketepikan kerana defendan-defendan sedar bahawa plaintif mempunyai kepentingan dalam tanah tersebut tetapi telah meneruskan dengan tindakan mereka tanpa menghiraukan perkara itu. Terkilan, defendan kedua dan ketiga merayu ke Mahkamah Rayuan. Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi dan memihak pada plaintif. Mahkamah ini membenarkan permohonan defendan kedua dan ketiga untuk kebenaran rayuan atas soalan tunggal: apabila pihak yang memperoleh penghakiman ingkar terhadap pihak yang lain dan menamakannya sebagai pemilik sebidang tanah dalam satu guaman sivil yang berasingan, adakah keputusan Mahkamah Tinggi sekarang, dalam memutuskan penghakiman bahawa pihak ketiga adalah pemilik tanah itu, mematuhi keputusan *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* dan *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* berhubungan kuasa Mahkamah Tinggi untuk mengetepikan satu perintah mahkamah yang berbidang kuasa serentak.

Diputuskan (menolak rayuan)
Oleh Ahmad Maarop PMR menyampaikan penghakiman mahkamah:

(1) Di mana perintah muktamad Mahkamah Tinggi adalah tidak sah dan terbatal disebabkan ketaksahan dan tiada bidang kuasa, perintah itu boleh diketepikan oleh Mahkamah Tinggi lain yang berbidang kuasa

serentak. Satu perintah yang dibuat melanggar keadilan asasi dengan jelasnya adalah satu contoh perintah sebegitu. Dalam kes sebegitu, pihak yang terjejas oleh perintah itu boleh memohon untuk mengetepikannya dalam prosiding kolateral. Penghakiman ingkar dan penghakiman persetujuan yang dimeterai dalam kes 2004 adalah contoh perintah-perintah yang dibuat melanggar keadilan asasi.

(2) Tiada keterangan yang menunjukkan defendan pertama telah menyaksikan TYL menandatangani Borang 14A atau tanah telah dibeli oleh TTK dan didaftarkan dalam nama TYL dengan niat membantu TYL. Tiada juga keterangan berkaitan apa-apa pindah milik daripada TYL kepada TTK. Tiada keterangan penipuan oleh pihak plaintif apabila dia memasuki satu perjanjian jual beli dengan defendan pertama untuk membeli tanah tersebut. Defendan kedua, ketiga dan keempat memang mengetahui dan sedar tentang kepentingan plaintif dalam tanah apabila penghakiman ingkar dan penghakiman persetujuan dimeterai. Plaintif tidak dijadikan pihak dalam kes 2004 sebelum perintah-perintah itu dibuat, dan perintah-perintah itu pun tidak diserahkan kepada plaintif. Oleh itu, penghakiman ingkar dan penghakiman persetujuan yang menafikan plaintif akan kepentingan berdaftarnya dalam tanah itu adalah tidak teratur, tidak sah dan terbatal dan tidak membawa apa-apa kesan pada plaintif dan harus diketepikan.

(3) Mahkamah Tinggi, dengan itu, bertindak betul dalam membenarkan tuntutan plaintif yang membawa kesan mengetepikan perintah-perintah terdahulu Mahkamah Tinggi yang dibuat dalam kes 2004. Ini memadai untuk melupuskan rayuan itu. Tiada keperluan untuk menjawab soalan berkaitan kebenaran rayuan. Perintah-perintah mahkamah bawahan disahkan.

Oleh Rohana Yusuf HMP (menyetujui):

(1) Jelas sekali bahawa tindakan writ plaintif mencabar kesahihan perintah persetujuan. Oleh kerana guaman itu sendiri dimulakan demi mencabar mod pindah milik akibat penghakiman persetujuan, tindakan berasingan untuk membantah perintah persetujuan tidak lagi diperlukan kerana sudah termaktub dalam penyataan tuntutan plaintif. Tuntutan plaintif di sini, atas segala niat dan tujuan, satu cabaran terhadap penghakiman persetujuan, yang tidak teratur, tidak sah dan terbatal dan dengan betulnya diketepikan oleh Mahkamah Rayuan.

Case(s) referred to:

Ann Joo Steel Bhd v. Pengarah Tanah Dan Galian Negeri Pulau Pinang & Anor And Another Appeal [2019] 1 LNS 1126 FC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors [1996] 2 CLJ 185 SC ***(refd)***

Kheng Chwee Lian v. Wong Tak Thong [1983] 2 CLJ 191; [1983] CLJ (Rep) 195 FC ***(refd)***

Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***

Siaw Swee Mie v. Lembaga Lebuh Raya Malaysia [2018] 4 CLJ 196 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 78(1)
National Land Code, ss. 340, 417
National Land Code (Penang and Malacca Titles) Act, ss. 27(3), 28(3)
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d)

For the appellants - Abdul Razak Abu Bakar & Jasvinder Singh; M/s Mazwan Pathma & Co

For the 1st respondent - Esther Geetha Jayaraja; M/s Chew Das & Jayaraja

For the 2nd respondent - Tan Ping Nah; M/s Jayaratnam & Partners

For the 3rd respondent - Mohd Syahrizal Shah Zakaria & Nik Haizie Azlin Nabidin; SLA, Selangor

[Editor's note: For the Court of Appeal judgment, please see Ang Game Hong & Anor v. Tee Kim Tiam & Ors [2018] 1 LNS 2008 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmad Maarop PCA:

[1] This judgment is prepared pursuant to s. 78(1) of the Courts of Judicature Act 1964, as Justice Zaharah Ibrahim the then Chief Judge of the High Court of Malaya and Justice Aziah binti Ali FCJ had since retired. My learned sister Justice Alizatul Khair Osman Khairuddin FCJ, had read this judgment in draft and agreed that this judgment be our judgment. My learned sister Justice Rohana Yusuf FCJ, had also read this judgment in draft and agreed that this be our judgment and she had written a supporting judgment.

[2] For convenience, the parties will be referred to as they were in the High Court. This case concerns the appeal by the second and the third defendants against the decision of the Court of Appeal which had, on 6 February 2017 dismissed their appeal against the decision of the High Court which allowed the plaintiff's claim against them.

[3] The background facts leading to the present appeal are these. The original proprietor of a piece of land known as Hakmilik Geran No. GM 175, Lot Number 752, Mukim Ijuk, Daerah Kuala Selangor, Selangor (the land) was Tan Yew Lim (TYL) who was the first defendant's father. TYL passed away on 23 October 1995. TYL and Tan Tuan Kam (TTK) were brothers. The second defendant was the wife of TTK. The third defendant was the son of TTK and the second defendant. TTK had also passed away.

[4] It is not disputed the plaintiff had purchased the land from the first defendant by a sale and purchase agreement (S&P) dated 27 January 2005 for a consideration of RM300,000 which was fully paid. The land was transferred to and registered in the plaintiff's name on 27 June 2005.

[5] According to the first defendant, he had inherited the land from his late father (TYL). This is evident from the distribution order dated 22 December 1997.

[6] The second defendant and the third defendant claimed that the land was bought by TTK but registered in TYL's name as TTK wanted to assist TYL who was then unemployed with no source of income to support his family. TYL promised TTK that the title to the land would be transferred to TTK later. TTK's family developed the land and shared the proceeds from the income obtained from rubber trees, palm oil and fruit trees which were planted on the land before the first defendant was born in 1972. The second and third defendants claimed that on 30 September 1995, in the first defendant's presence, TYL signed Form 14A to transfer the land to the second defendant. The first defendant subsequently entered a caveat on the land as a result of which the Form 14A was rejected by the Land Office.

[7] On 24 September 2004, the second defendant filed a civil suit number 21-211-2004 (the 2004 case) against the first and fourth defendants seeking for the court's order to declare that the land was at all material time vested in her, for the first defendant to transfer the land to her, and for any caveat entered by the first defendant to be revoked.

[8] On 16 December 2010, the second defendant (as the plaintiff in the 2004 case) obtained a judgment in default in that case against the first defendant for the latter's failure to attend the court and comply with the court's direction to appoint a lawyer to represent him. The High Court made the following order:

> Mahkamah mengistiharkan bahawa tanah EMR 15, Geran 752 di daerah Ijok, Kuala Selangor adalah pada semua masa yang material kepunyaan Plaintif kerana Plaintif memiliki, memajukan dan mengerjakan tanah tersebut tanpa gangguan daripada pemilik berdaftar dahulu Tan Yew Lim sehingga kematian beliau.

[9] On 5 April 2011, based on the said judgment in default, a consent order was entered between the second defendant (the plaintiff in the 2004 case) and the fourth defendant (Pentadbir Tanah Kuala Selangor, the second defendant in the 2004 case) for the fourth defendant to register the second defendant as the land's proprietor. It was also ordered that all dealings by the first defendant (Tan Ping Nah) in relation to the land were not valid. The first defendant was not made a party to the consent order. The plaintiff was also not made a party to the consent order. The terms of consent order in full are as follows:

(a) Susulan daripada penghakiman bertarikh 16hb Disember 2010, Plaintif dan Defendan Kedua bersetuju bahawa Defendan Kedua menerima Borang 14A yang telah difailkan oleh Plaintif dan mendaftarkan nama Plaintif di dalam geran tanah berkenaan, iaitu GM 175, Geran No. 752 Mukim Ijok, Daerah Kuala Selangor.

(b) Perintah Pentadbir yang mendaftarkan nama Defendan Pertama sebagai pemilik tanah tersebut diketepikan.

(c) Semua urusan Defendan Pertama yang didaftarkan oleh Pejabat Tanah Kuala Selangor dibatalkan/diketepikan.

(d) Kaveat yang dimasukkan oleh Defendan Pertama ke atas tanah tersebut diperintahkan tidak sah kerana Perintah bertarikh 16hb Disember 2010.

(e) Semua urusan oleh Defendan Pertama berkenaan dengan tanah tersebut iaitu GM 175, Geran No. 752 Mukim Ijok, Daerah Kuala Selangor diperintahkan tidak sah kerana Perintah bertarikh 16hb Disember 2010.

(f) Defendan Kedua mendaftarkan dan menyerahkan kepada Plaintif satu salinan geran tanah GM 175, Geran No. 752 Mukim Ijok, Daerah Kuala Selangor yang membuktikan pendaftaran tersebut dalam tempoh 30 hari daripada tarikh Penghakiman Persetujuan diserahkan ke atas Defendan Kedua.

(g) Plaintif tidak menuntut sebarang gantirugi atau kerugian daripada Defendan Kedua.

(h) Plaintif dan Defendan Kedua menuntut kos daripada Defendan Pertama setelah ditaksirkan.

[10] Following the court order in the 2004 case, the land was transferred from the plaintiff to the second defendant *vide* presentation no. 1767/2012. This transfer was registered on 12 July 2012. Later, the land was transferred from the second defendant to the third defendant *vide* presentation no. 2330/2012 and registered on 21 September 2012.

[11] Thus, seven years after the said land was transferred and registered in his name after purchasing it from the first defendant, the plaintiff 'lost' it when it was transferred to and registered in the second defendant's name before it was subsequently transferred to and registered in the third defendant's name. On 18 March 2013, the plaintiff then commenced an action *vide* writ summons No. 21NCVC-29-03-2013 (the action which is the subject of the present appeal) ("the plaintiff's action") against the defendants praying for the following orders:

(i) a declaration that he is a *bona fide* purchaser and proprietor of the land which he had purchased pursuant to a sale and purchase agreement (SPA) dated 27 January 2005 between him and the first defendant;

(ii) a declaration that the transfer of the land from the plaintiff to the second defendant by presentation no 1767/2012 and from the second defendant to the third defendant by presentation no. 2330/2012 are not valid;

(iii) costs; and

(iv) further reliefs as the court thinks fit.

[12] The High Court allowed the plaintiff's claim with costs to be borne by the second and the third defendants. The learned High Court Judge was of the view that the judgment in default dated 16 December 2010 and consent judgment could be set aside as the defendants were aware of the plaintiff's interest in the land but nevertheless proceeded without due regard to the same. The order of the High Court in favour of the plaintiff in the plaintiff's action is as follows:

> i) Satu Deklarasi bahawa Plaintif adalah pembeli *bona fide* dan pemilik bagi hak milik Geran No. GM 175, Nombor Lot 752, Mukim Ijuk, Daerah Kuala Selangor, Negeri Selangor Darul Ehsan berdasarkan Perjanjian Jual Beli bertarikh 27 Januari 2005 yang dimasukkan antara Plaintif dan Defendan Pertama;
>
> ii) Satu Deklarasi bahawa penukaran nama bagi hak milik tersebut daripada Plaintif kepada Defendan Kedua melalui penyerahan no. 1767/2012 seperti yang dicatit dalam Catatan Carian Persendirian dan daripada Defendan Kedua kepada Defendan Ketiga melalui penyerahan no. 2330/2012 seperti yang dicatit dalam Catatan Carian Persendirian adalah tidak sah;

[13] As in his claim, the plaintiff did not pray for an order to be made against the first and the fourth defendants, the learned judge of the High Court did not make any order against them.

[14] Aggrieved with that decision, the second defendant and the third defendant then appealed to the Court of Appeal. On 18 May 2012, the Court of Appeal dismissed their appeal with costs. The Court of Appeal affirmed the decision of the High Court made in favour of the plaintiff, and

consequentially ordered the plaintiff to take steps under s. 417 of the National Land Code to enable his name to be re-registered on the title to the said land. On 13 July 2017, this court allowed the application by the second and third defendants for leave to appeal on the sole question as follows:

> When a party has obtained a judgment in default against another party naming her as the owner of a piece of land in a separate civil suit, does the decision of the High Court now, in giving a judgment that a third party is the owner of that land, comply with the decision of the Federal Court in *Badiaddin Mohd Mahidin & anor v. Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 and *Serac Asia Sdn Bhd v. Sepakat Insurance 5 Brokers Sdn Bhd* [2013] 5 MLJ 1 in relation to the power of a High Court to set aside an order of a court of concurrent jurisdiction?

Submissions Of The Second And Third Defendants

[15] The thrust of the submission by the learned counsel for the second and third defendants is that the plaintiff's suit (Writ Summons No. 21NCVC-29-03-2013) was an attempt to get the High Court to reverse the judgment of another High Court in favour of the second defendant in the 2004 case which decided that she was entitled to ownership of the land consequent to which she was registered as the proprietor of the land by the fourth defendant. The learned counsel submitted that the judgment granted by the learned High Court Judge in favour of the plaintiff in the plaintiff's action resulted in the obvious effect of contradicting the judgment obtained by the second defendant in 2010 in the 2004 case, which judgment had not been set aside. The learned counsel contended that the learned High Court Judge gave judgment for the plaintiff in the plaintiff's action under the guise of breach of natural justice, and according to the learned counsel, the Court of Appeal decided that the learned judge of the High Court was justified on the ground of lack of full disclosure of facts relating to the execution of the sale and purchase agreement of the land between the first defendant and the plaintiff, and also in the interest of natural justice. The learned counsel submitted that the learned judge of the High Court did not have the power to decide the way she did in the plaintiff's action following the decisions of this court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 and *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673; [2013] 5 MLJ 1. Learned counsel submitted that there is nothing in the *ratio decidendi* in *Badiaddin* (*supra*) to say that the court's inherent jurisdiction has an extended scope to correct an earlier regular judgment or order in exceptional circumstances, other than where the judgment had been granted in contravention of a statute. Thus, according to the learned counsel, the judgment given by the High Court in the plaintiff's action could not be allowed to stand because the judgment obtained by the second defendant against the first defendant in the 2004 case was neither

illegal nor tainted with lack of jurisdiction, and that further as the judgment in the 2004 case had not been set aside, there were effectively two valid and existing judgments which purportedly decide on the ownership of the said land.

[16] The learned counsel submitted that the question for which the leave to appeal was granted should be answered in the negative.

Submissions Of The Plaintiff

[17] The substance of the plaintiff's submission is that the High Court was right in allowing the plaintiff's claim on the land. The plaintiff had a registered interest on the land since 27 June 2005 and this fact was not considered by the High Court in the 2004 case when it entered default judgment against the first defendant. Learned counsel for the plaintiff submitted that the 2004 case was never decided on merits and no disclosure of the plaintiff's registered interest on the land was made to the court by any party in the 2004 case despite their knowledge of the same. Learned counsel submitted that had there been proper disclosure of the plaintiff's registered interest on the land to the court in the 2004 case by the parties to the case, the court would not have made the same judgments which had the effect of transferring the plaintiff's rights and interest on the land to the second defendant without naming the plaintiff as a party to the 2004 case. Learned counsel argued that the consent judgment in the 2004 case should be set aside because it was wrongly entered as the plaintiff's registered interest on the land was never taken into consideration by the court. Referring to *Badiaddin*, learned counsel submitted that the plaintiff had taken the correct approach by filing a fresh action to set aside the judgments entered against his registered interest in the 2004 case. It was further contended by the learned counsel that since the second and the third defendants failed to establish fraud as per their pleadings which could defeat the plaintiff's title to the land, at all material times, the plaintiff had indefeasible title to the land under s. 340 of the National Land Code. Relying on *Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors* [1996] 2 CLJ 185; [1996] 1 MLJ 761, *Badiaddin (supra)* and *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* (*supra*), learned counsel submitted that the learned judge of the High Court had correctly exercised her inherent power to set aside the judgments made in the 2004 case.

Submissions Of The First Defendant

[18] The thrust of the submission made on behalf of the first defendant is that the Court of Appeal was right in dismissing the appeal by the second and third defendants. In this regard, learned counsel emphasised on the fact that the plaintiff was never made a party to the 2004 case. Further, learned counsel submitted that there was non-disclosure of material facts by the second defendant.

Submission Of The Fourth Defendant

[19] Learned counsel submitted that the fourth defendant as the Land Administrator is the nominal defendant in the 2004 case. The fourth defendant will abide by whatever order given by this court. According to the learned counsel, if this court rule that the Court of Appeal was correct in its judgment, the order dated 16 December 2010 and the consent judgment dated 5 April 2011 between the second defendant and the fourth defendant which required the latter to register the second defendant as the proprietor of the said land, would be rendered invalid.

Decision Of This Court

[20] The appeal brings into focus the power of the High Court to set aside an order of another High Court of concurrent jurisdiction. It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. This is clear from the judgment of this court in *Badiaddin* (*supra*). However, there is a special exception to this rule and this is where the final judgment of the High Court could be proved to be null and void because of illegality or lack of jurisdiction. In such a case, a person affected by the order is entitled to apply to have it set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court. This is explained by Azmi FCJ in his leading judgment. His Lordship said at pp. 92-93 (CLJ); p. 409 (MLJ):

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank*'s case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality *or lack of jurisdiction* so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, *upheld the existence of a category of orders of the court '… which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make'.*
>
> The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, '*save that specifically it includes orders that have been obtained in breach of rules of natural justice'*. Similarly in this country, the statement of Abdoolcader J (as he then was) in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 2 MLJ 37 at p 39 5 provides the correct guideline on the subject:

> *The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack.* In collateral proceedings, the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock LJ (now a Law Lord) said (at p 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.
>
> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception. (emphasis added)

[21] In other words, where the final order of the High Court is null and void because of illegality or lack of jurisdiction, it could be set aside by another High Court of concurrent jurisdiction. An order made in breach of natural justice is clearly such an order. In such a case, the person affected by the order can apply to have it set aside in collateral proceedings. The implication of an order made in breach of natural justice was illustrated in *Siaw Swee Mie v. Lembaga Lebuh Raya Malaysia* [2018] 4 CLJ 196. In that case, the brief facts from the head notes are these. A piece of land was compulsorily-acquired by the Government in accordance with the Land Acquisition Act 1960. The defendants were the interested parties in the land while the plaintiff was the paymaster. The enquiry was held by the Land Administrator and the valuer valued the land at RM19,700,000. Pursuant to the enquiry, the Land Administrator awarded the defendants a total of the said sum and the defendants accepted the compensation without objection. Four years later, after the compensation was fully-paid, the plaintiff obtained a consent order for extension of time to object to the award ('extension order'). The defendant named in the application for extension of time was the Land Administrator. The defendants were not made parties and were not aware of these proceedings. The plaintiff objected against the award by the

Land Administrator and the objection was referred to the High Court. The defendants were listed as interested persons. On 4 November 2011 the Judicial Commissioner, sitting with two assessors, held, *inter alia*, that there was an error in the valuation of the award and the defendants had been overpaid the sum of RM3,518,634 10 ('the overpaid sum') which amount was to be returned to the plaintiff ('the overpayment order') ('the earlier proceeding'). There was nothing on record to show that the extension and overpayment orders were served on the defendants. However, the Land Administrator wrote to all the defendants at one common address, requesting them to refund the overpaid sum but no payment was forthcoming. Then by way of an originating summons the plaintiff commenced an action against the defendants, seeking for the overpaid sum. The third defendant applied to strike out the originating summons pursuant to O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012. In dismissing the defendant's application, the Judicial Commissioner held that the originating summons was not a plain and obvious case for striking out as there were triable issues which warranted a full hearing. The third defendant appealed to the Court of Appeal which allowed it. In delivering judgment of the Court of Appeal Tengku Maimun Tuan Mat JCA (later CJ) referred to the Federal Court judgment in *Kheng Chwee Lian v. Wong Tak Thong* [1983] 2 CLJ 191; [1983] CLJ (Rep) 195 and said:

> [36] In *Kheng Chwee Lian* (*supra*), the respondent (plaintiff) had bought a half share in a piece of land from the appellant (defendant) and had paid the purchase price. Subsequently, the plaintiff was induced into signing another agreement under which he was allocated a small portion of the land. The plaintiff alleged that he was induced by the false representation of the defendant to sign the second agreement.
>
> [37] The plaintiff applied to the High Court for a declaration that he was the owner of one-half of the land and an order that the land be subdivided. *However, portions of the land had been transferred by the defendant to her sons. In taking out the writ against the defendant, the plaintiff did not name the sons as co-defendants.* The High Court declared the plaintiff as the owner of one-half of the land. The High Court also ordered that the land be so subdivided that the plaintiff should retain the area he now occupies plus an additional area so as to make up his total holding to be one-half of the entire land and that the remaining area should go to the defendant and her five sons.
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> [38] The defendant appealed to the Federal Court. At the hearing of the appeal, the sons were given leave to intervene. The interveners argued that the order of the learned judge clearly affected their registered title and that they had been denied a hearing. It was further argued that an order so made was wholly irregular. The Federal Court allowed the appeal by the interveners and set aside the order of the High Court directing that the plaintiff be entitled to one-half of the entire area of the said land.

A [39] Seah FJ, speaking for the Federal Court said at p. 200 (CLJ); p. 323 (MLJ):

> In our judgment, *the court below has no jurisdiction inherent or otherwise*, over any person other than those properly brought before it, as parties or as persons treated as if they were parties under statutory
B provisions ... The terms "judgment" and "order" in the widest sense may be said to include any decision given by a court on a question or questions at issue between the parties to a proceeding properly before the court [see para 501 of *Halsbury's Laws of England* (4th ed.) Vol. 26 at page 237]. And at page 550 the following passages appear:
>
C > > Subject to appeal and to being amended or set aside, a judgment is conclusive as between the parties and their privies and is conclusive evidence against all the world of its existence, date and legal consequences.
>
> We are constrained to agree with the submission of learned
D counsel for the interveners that *the order of the learned judge was wholly irregular insofar as it purports to affect the registered title, share and interest of the said interveners in the said land when they had not been made parties or given a full opportunity of taking part in the proceedings in the court below. If the respondent had wanted the whole one-half share in the said land in pursuance of the first agreement after knowledge of the*
E *registration of these transfers by the appellant to her five sons, he ought to have joined the sons as co-defendants in the proceeding.*

[40] Applying the above principle, the learned Judicial Commissioner in the earlier proceeding *lacked the jurisdiction to pronounce* the order dated 4 November 2011 affecting the rights of the third defendant who was not
F properly before the court. *The order dated 4 November 2011 insofar as it purports to deprive the third defendant of the compensation already paid pursuant to the enquiry for the land acquisition, made in breach of natural justice was therefore wholly irregular, null and void and had no effect on the third defendant* (see also *Badiaddin Mohd 25 Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393).

G [41] The learned Judicial Commissioner ruled that the question whether the third defendant can keep the over-compensated amount must be resolved *via* a full hearing. In our judgment, whether or not the third defendant can keep the over-compensated amount depends on the validity of the order dated 4 November 2011. *In the light of the principle*
H *enunciated in Kheng Chwee Lian (supra), the order clearly was not a valid and regular order.* Hence, the issue whether the third defendant can keep the overpaid compensation and the need for a full hearing to determine such issue did not arise. (emphasis added)

I

[22] Reverting to the present appeal, in our view, the judgment in default and the consent judgment entered in the 2004 case were examples of orders made in breach of natural justice. Contrary to what was averred by the second and the third defendants, the learned High Court Judge found no evidence to suggest that the first defendant had witnessed TYL signing Form 14A or that the land was bought by TTK and was only registered in TYL's name with the intention of helping TYL. There was also no evidence of any transfer from TYL to TTK. We have no reason to disagree with those findings. The learned trial judge also made a finding of fact that there was no evidence of fraud on the part of the plaintiff when he entered the sale and purchase agreement with the first defendant to buy the said land. The learned trial judge found as a fact that the second, the third and the fourth defendants were all aware of the plaintiff's interest in the land when the judgment in default and the consent judgment were entered. The plaintiff was neither made parties to the 2004 case before those orders were made, nor were those orders served on the plaintiff. Indeed, the learned judge of the High Court also found as a fact that the plaintiff only knew of the second defendant's interest when his application to enter a caveat on 13 September 2012 was rejected by the Land Office which led to his filing of the plaintiff's action.

[23] Further, with regards to the consent order, reference must also be made to *Khaw Poh Chhuan v. Ng Gaik Peng & Ors* (*supra*) where this court held that the appellant who was not a party to the originating summons in which the consent order was made had the *locus standi* to claim the relief of setting aside the consent order. In that case, in 1943, one Mr Yap Cheng ('the deceased') died intestate leaving an estate which comprised, *inter alia*, four pieces of land. He was survived by his two widows and their issues, all having beneficial interests in the estate. Upon the death of one of the widows who was the administratrix of the estate ('the assignor's mother'), one of the issues ('the assignor/the fifth respondent') was appointed administratrix *de bonis non*. The assignor was entitled to shares in the estates of both the deceased and her mother. Pursuant to the terms of two agreements made in 1964 and 1965 ('the agreements'), the assignor assigned all her beneficial interests in the estates to the appellant (assignee). As purchaser and assignee, the appellant then lodged, a caveat against the four pieces of land. In 1973, upon the failure of the assignor and her co-administrator to administer and distribute the property, an administration action was commenced against them by several beneficiaries under the estate. In reply, and in stating their willingness to distribute the assets, both administrators exhibited a family settlement agreement ('the settlement agreement'). The existence and interest of the appellant was neither mentioned in the settlement nor revealed in the administration action. A consent order was subsequently granted in terms of the provision of the settlement agreement. The assignor later offered to settle,

by refund of money and pecuniary compensation, with the appellant. The appellant rejected the offer and refused to withdraw his caveat. The assignor and her co-administrator then attempted to remove it, but they failed. Pursuant to the consent order, one of the four pieces of land ('the fourth piece of land') was sold to the ninth respondent. The transfer was registered while the caveat endorsement remained uncancelled on the Register. The appellant commenced action for a declaration that the consent order and the settlement agreement were void and for various reliefs including a claim to his rightful share to the proceeds of sale obtained from the sale of the fourth piece of land.

[24] In delivering the judgment of the court, dealing with the consent order, Poh Swee Chin FCJ said:

> *The complaint of the assignee before us is that the consent order is not valid and in effect he asks this court to brush it aside, inter alia, to have his name registered as a part owner of the four pieces of land pursuant to the assignment.* An order of a superior court is always deemed to be valid and must be obeyed until it is set aside in proceedings commenced for the purpose of setting it aside. Bearing in mind, if the assignee is to succeed, the consent order would have to be set aside.
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> *It is well established that a perfected consent order can only be set aside in a fresh action filed for the purpose:* see eg *Huddersfield Banking Co Ltd v. Henry Lister & Sons Ltd* [1895] 2 Ch 273. *The consent order was given in Originating Summons No 209/1973. It is now sought to have it set aside in the subsequent and separate civil suit concerned in the instant appeal. The civil suit is of course the fresh action for the purpose of setting aside the consent order.*
>
> The next question that arises naturally is that *with regard to the relief of setting aside the consent order, seeing that he was not a party to the originating summons in which the consent order was made, can the assignee claim such a relief?*
>
> In our view, *the assignee should have been made a party in the family settlement agreement and in the originating summons in place of the assignor who deliberately disowned the assignment. All the other parties were aware of the assignment because of another previous originating summons which was filed for distribution of the assets of the* deceased father in accordance with the Distributions Act 1958. *All such parties chose to treat the assignee as non-existent and to dispose of the interest of the assignee without his knowledge and consent. We therefore hold that the assignee has the locus standi to claim the relief of setting aside the consent order.*
>
> Then, one would have to deal with the merits of such a claim of such relief more deeply.
>
> A consent order is an order of the court carrying out an agreement between the parties. It used to be thought at one time that only a ground of fraud could cause a consent order to be set aside. It is now well settled that a consent order can be set aside on the same grounds as those on which an agreement may be set aside, see eg again *Huddersfield Banking Co.*

It is elementary that the first requisite of a contract is that the parties should have reached agreement which would involve an offer and acceptance of the offer, *inter alia*. *The assignee had never reached such agreement with all the parties to the family settlement agreement and the family settlement agreement purported to dispose of his beneficial interest without his knowledge and consent. Thus, not only that the family settlement agreement is not binding on the assignee because he was not a party to it, but it also attempted to dispose of his interest by the agreement, to be backed by the sanctity of a consent order of the court too. A situation of grave injustice was thus caused to the assignee by the family settlement agreement and based on it, the consent order which was sought to be set aside.* We cite below a case which we approve and adopt in this connection.

Thus in *Marsden v. Marsden* [1972] 2 All ER 1162 a divorce case, counsel for the wife agreed to a consent order for her to release her charge on the matrimonial home and to be paid maintenance for herself and her children. All these were contrary to her express instructions, and this was unknown to counsel for the husband. On the same day the consent order was extracted, either contemporaneously or some time before, the wife applied to set aside the consent order. It was set aside by the learned judge holding or approving the proposition that in such cases, the court had power to interfere in setting aside the consent order for in the circumstances, grave injustice would be done by allowing the compromise to stand, although the limitation of counsel's authority was unknown to the other side. By the way, this case in another way seems to be an exception on its own facts to the rule that a consent order, when perfected, can only be set aside in a fresh action, and not in the same action in which the consent order was made.

This case shows that *even if lack of consent was unknown to the other side, the court has the power to interfere with such a consent order where grave injustice would be caused by allowing the consent order to remain.* This would be relevant to a theoretical position in our case if we assume for the sake of argument that apart from the administrators of the deceased father, all the other beneficiaries were unaware of the assignment.

We therefore propose that the family settlement agreement and the consent order ought to be set aside except for a serious impediment to such proposed course of action which will be presently dealt with.

(emphasis added)

[25] Turning to the appeal before us, in our view, the judgment in default and the consent order which deprived the plaintiff of his registered interest in the land were irregular, null and void and had no effect on the plaintiff, and ought to be set aside. The High Court was therefore right in allowing the plaintiff's claim which had the effect of setting aside the earlier orders of the High Court made in the 2004 case.

[26] What we have said thus far is sufficient to dispose of this appeal. We therefore find no necessity to answer the question in respect of which leave to appeal was given. In the result, the appeal is dismissed with costs. The orders of the courts below are affirmed.

Rohana Yusuf FCJ (concurring):

[27] I have read the judgment of my learned brother Ahmad bin Haji Maarop PCA, in draft. I agree with the opinion expressed on the various issues raised and the conclusion arrived at by His Lordship.

[28] I would like to clarify further on the legal issue raised concerning the setting aside of a judgment of a High Court by another High Court as discussed and deliberated in the instant appeal. I am referring to the submissions of learned counsel for the second and the third defendants, as stated in para. [14] of this judgment.

[29] This court had in the earlier decision in *Ann Joo Steel Berhad v. Pengarah Tanah Dan Galian Negeri Pulau Pinang & Anor And Another Appeal v. Tenaga Nasional Berhad* [2019] 1 LNS 1126, held that a challenge on the validity of another High Court order must be impugned in a direct and specific proceeding filed for that purpose, be it in the same proceeding or a separate one. It cannot be challenged by merely raising it as a defence to an action. It was observed in that case that, the underlying reason for this legal principle is to preserve the sanctity and finality of a court order.

[30] *Ann Joo Steel Bhd*, in brief, is about a case where the plaintiff sued the first defendant, Tenaga Nasional Berhad for trespass and the other defendants for failure to adhere to an order made by the Penang High Court in 1995 in relation to a border dispute under the National Land Code (Penang and Malacca Titles) Act 1963. In that order, the High Court remitted the matter to the District Commissioner of Land Titles for a determination of the border in accordance with the law. At first and in compliance with that 1995 Order, the Collector re-measured the border in dispute and decided on a new border. That decision was affirmed by the Deputy Director of Land Titles as well as the Appeal Board under ss. 27(3) and 28(3) of the National Land Code (Penang and Malacca Titles) Act. This resulted in the land in dispute to form part of the plaintiff's land. The first defendant, Tenaga Nasional Berhad, however, continued to occupy the said disputed land in defiance of that re-measurement. Instead, the first defendant proceeded to apply for that disputed land to be alienated to them. The application was allowed, and the disputed land was alienated to Tenaga Nasional Berhad. The plaintiff then filed an action on trespass against Tenaga Nasional Berhad as well as the other defendants, including Pengarah Tanah Dan Galian Pulau Pinang.

[31] In that trespass suit, the defendants raised as one of their defences that the order made by the High Court in 1995 was null and void to justify their non-compliance with the consequential decision by the Land Office emanating from the 1995 Order of the High Court. It was in that context that this court ruled that the defendants could not be allowed to take up a challenge or impugn an order of the High Court unless by a specific action. A party affected by order of a court cannot on its own decided to disobey an order of a court without taking any step to set it aside.

[32] The defendants, in that case, had merely sat on the order of a court for a span of 15 years without any step taken to set it aside. When sued by the plaintiff, then only they defended the action against them on the ground *inter alia*, that 1995 Order by the High Court was unlawful, in order to justify their failure to observe that consequential decision of the Land Office.

[33] It must, however, be noted that, in the current appeal, the plaintiff in his writ action sought to declare that he is a *bona fide* purchaser by virtue of a sale and purchase agreement dated 27 January 2005 between him and the first defendant. The other prayer sought was for a declaration that the transfer of the land to the second defendant in pursuant to a consent order was not valid. In seeking for these declarations, the plaintiff is in effect challenging the transfer effected consequent upon the consent order in the 2004 case. The reasons for the challenge had been well deliberated earlier, in this ground of judgment. In effect, therefore, the plaintiff in the suit in the current appeal is challenging the consent order which resulted in the wrongful transfer.

[34] In other words, it is clear by the writ action that the plaintiff is effectively challenging the validity of the consent order. Since the suit in itself is instituted to challenge the transfer made resultant from the consent order, we are of the view that no further separate action to challenge that consent order is therefore required since it is already embedded in the statement of claim of the plaintiff.

[35] It is pertinent to note that what is objectionable in *Ann Joo Steel Bhd* is the total disobedience and disregard of a valid court order of 1995 by the defendants therein. After having sat on that order for 15 years, and having faced with a legal suit, then only the defendants decided to raise issues on the illegality of the 1995 Court Order.

[36] In contrast, the plaintiff in the current appeal did attempt to include a specific prayer to set aside the consent order, by applying for an amendment of the statement of claim on 18 December 2013. It was dismissed by the High Court. The plaintiff filed the current suit to declare himself as a *bona fide* purchaser on the basis that the consent order in 2004 case was unlawful for failure to observe the rule of natural justice. Upon discovering about the transfer of the land pursuant to the consent order, the plaintiff had also taken step to impugn the consent order and the eventual transfer, by applying to intervene in the 2004 case. The application of the plaintiff was however dismissed by the High Court and reaffirmed by the Court of Appeal.

[37] Thus on the facts and circumstances of the current appeal, it is clear to my mind that the plaintiff in this suit had already taken steps to set aside the consent order and need not file a separate action to do the same.

A Therefore, the contention of the counsel for the second and third defendants cannot be sustained. The claim of the plaintiff herein is, to all intent and purposes a challenge on the consent order, which we find to be irregular, null and void and was rightly set aside by the Court of Appeal.

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